

***NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 01-101-01
MARCH 1, 1991***

***Fisheries Management
Secretarial Review of FMPs***

***PROCEDURES FOR INITIATING SECRETARIAL REVIEW OF FMPs AND
AMENDMENTS***

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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1335 East-West Highway
Silver Spring, MD 20910
THE DIRECTOR

March 1, 1991

MEMORANDUM FOR: Regional Directors

FROM: William W. Fox, Jr.

SUBJECT: Procedures for Initiating Secretarial Review of
Fishery Management Plans and Amendments

At the Council Chairmen's Meeting in Tampa, discussion of the draft interpretive rule regarding Magnuson Act fishery management plans (FMPs) and FMP amendments confirmed that there is need to standardize procedures for initiating Secretarial review of these actions. Significant delays are occurring in processing fishery management actions that lack critical elements. Every FMP or amendment must be accompanied by all documents necessary to permit timely conformance with the Magnuson Act and other applicable law; Secretarial review cannot begin without them.

There was strong general agreement among the Council Chairmen and Executive Directors that formal review should not begin before the package is complete. Therefore, we agreed to establish written procedures for starting formal review to try to resolve the problem. If the situation is not corrected, we will again consider publication of an interpretive rule. Therefore, effective immediately, the following procedure will be followed for initiating Secretarial review of FMPs and amendments.

Procedure for Initiating Secretarial Review

1. All documents required for Secretarial review will be submitted by the Councils to the Regional Director (see below for a list of these documents). Copies should be sent simultaneously to F/CM, but the copies will be considered only drafts at this stage.
2. Any of the required documents that have not been prepared by the Council, by agreement with the Regional Director (e.g., PRA package, proposed rule, etc.), must be prepared by the Regional Office in consultation with the Council or, if prepared by the Science Center, be submitted to the Regional Director. The Regional Director will send to F/CM copies of all documents received as soon as possible to allow preliminary review; before the "transmit date" is declared, all documents will be considered drafts only. Close consultation between the Regional Office and Headquarters is strongly encouraged at this stage.
3. The Regional Director will decide whether the required documents are present and meet at least the minimum requirements for making the necessary determinations. If any document is deemed inadequate to make those determinations, it must be made adequate before the FMP or amendment is considered complete for

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES



purposes of declaring the "transmit date." The proposed rule must accurately reflect the contents of the FMP or amendment it is to implement. The date on which all of the required documents have been received by the Regional Director and have been adjudged to be adequate is the "receipt date," and the Regional Director will then declare the "transmit date," which is the date 5 days prior to the "receipt date."

4. If any Council disputes any decision made by the Regional Director, the Council may appeal to the AA who will make a final determination within 5 working days of receipt of the Council's appeal.

5. Once the "transmit date" has been declared, the Regional Director will recommend to the Assistant Administrator, based on a preliminary evaluation of consistency with the national standards, whether to proceed with Secretarial review or to disapprove the FMP or amendment.

6. The Regional Director will, on the "receipt date," send all necessary documents for Secretarial review to F/CM, along with a completed checklist (see attachment) certifying that the required documents are present and adequate to make all required determinations. The Regional General Counsel should also certify that the package, including the proposed rule, is complete and adequate.

7. If disapproval is recommended, the Regional Director must immediately notify the Assistant Administrator of that recommendation.

8. Upon receipt of the certified, complete submission package from the Regional Director, NMFS Headquarters will immediately commence a review to determine preliminarily whether the FMP or amendment is consistent with the national standards, other provisions of the Magnuson Act, and all other applicable law and whether the documents are sufficient in scope and substance to warrant review under the Magnuson Act.

9. If Headquarters concurs with the recommendation of the Regional Director that a preliminary evaluation indicates consistency with the national standards and other applicable law, a notice of availability will be published in the Federal Register and Secretarial review will continue. If Headquarters does not concur with the recommendation, the Assistant Administrator will determine whether to disapprove the FMP or amendment. No more than 2 working days should elapse between the "receipt date" and filing the notice of availability or deciding not to proceed with Secretarial review. F/CM will prepare a schedule for processing the action under the Magnuson Act and will distribute the schedule to the Regional Office and to GCF. "Day 1" is the day (whether weekend, holiday, or working day) following the "receipt date."

cc: Science Directors; Regional Attorneys; F/CM(2); F/CM2(2);
GCF, F/CU(2)

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Documents Required to Initiate Secretarial Review

The following documents are required to initiate Secretarial review. In their absence, the Secretary, and those delegated authority by the Secretary, cannot make all determinations required by the Magnuson Act and other applicable law. The required documents are:

- ✓ 1. FMP or FMP amendment.
- ✓ 2. Proposed regulations, if any.
- ✓ 3. A regulatory impact review (RIR).
- 4. A regulatory flexibility analysis (RFA), if the action is significant under the RFA. - add...
- ✓ 5. An environmental assessment (EA); or environmental impact statement (EIS); or supplemental environmental impact statement (SEIS).
- 6. A section 7 biological opinion under the Endangered Species Act, if required; or an informal consultation signed by the Regional Director concluding that formal consultation is not required.
- 7. A Request for Approval of Information Under the Paperwork Reduction Act ("PRA package"), if required.

In addition, the following documents are needed to process the FMP or FMP amendment. They must be prepared and submitted as soon as possible after the "receipt date," preferably along with the FMP or amendment package, to Headquarters (attention: F/CM). Because these documents are administrative, rather than statutory, requirements, their availability does not impact declaration of the "transmit date." However, failure to prepare and send these documents to F/CM in a timely manner will delay the review process and filing of the proposed rule. These additional documents are:

- 1. Regional Director's decision memorandum to publish the proposed rule (signed original).
- 2. Regional Attorney's "work product" (signed original).
- 3. Science Director's certification (for overfishing definitions) (signed original).
- 4. Notice of availability to be published in the Federal Register.

5. Memorandum from Assistant Administrator to General Counsel, DOC.
6. Memorandum to Small Business Administration, if required.
7. Memorandum from the Assistant Administrator to the Under Secretary for Oceans and Atmosphere (if the action is controversial).
8. Copies of letters sent to the states regarding Coastal Zone Management Act consistency.

If they are needed, the following additional documents should be provided to F/CM as early in the review process as they are available:

1. Federalism Assessment.
2. Taking Implications Assessment.

Conclusion

Timely review of fishery management actions, in addition to being mandated under the Magnuson Act, is necessary to address effectively problems in the fisheries. To accomplish this, it is imperative that the Councils, the Regions, including General Counsel, and the Centers work together cooperatively to produce complete, high-quality documents that satisfy all statutory requirements and provide the public with the information necessary to comment on proposed measures. That collaboration must include coordinated efforts to agree on a schedule for submission and to prepare the analyses and documents required for Secretarial review, to the extent possible, in advance of the Council's final decision to submit an FMP or amendment. You should make every effort to achieve this.

Attachment

MEMORANDUM FOR: William W. Fox, Jr.

FROM: [Regional Director]

SUBJECT: Transmit Date for [Title of FMP or Amendment]

The [Council] has submitted [Title of FMP or FMP amendment] for Secretarial review. I have reviewed the [FMP or amendment] and have determined that all documents required to make determinations under the Magnuson Act and other applicable law are present and adequate to make the required determinations. Therefore, the "receipt date" for this action is [date] and I declare that the "transmit date" for this action is [date]. I have also completed a preliminary evaluation of the action for consistency with the national standards, other provisions of the Magnuson Act, and other applicable law and recommend that a notice of availability be published in the Federal Register. The following documents, which accompany this memorandum, comprise the complete [FMP or amendment] submission package:

	<u>Present</u>	<u>Not Required</u>
1. FMP or FMP amendment.	[]	[]
2. Proposed regulations.	[]	[]
3. Regulatory impact review (RIR).	[]	[]
4. Regulatory flexibility analysis (RFA).	[]	[]
5. A NEPA statement; or environmental assessment (EA); or environmental impact statement (EIS); or supplemental environmental impact statement (SEIS).	[] [] [] []	[] [] [] []
6. A section 7 biological opinion ESA; or a statement of informal consultation.	[] []	[] []
7. A Request for Approval of Information Under the Paperwork Reduction Act.	[]	[]

Attachments



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington D.C. 20230

OFFICE OF THE GENERAL COUNSEL

January 11, 1992

MEMORANDUM FOR: OIG - Andrew Cochran

FROM: GCF - Margaret Frailey Hayes *mfh*

SUBJECT: Initiating Secretarial Review of FMPs and Amendments

This memo is to clarify Bill Fox' March 1991 memo entitled "Procedures for Initiating Secretarial Review of Fishery Management Plans and Amendments," and to distinguish between the decision to "start the clock" for ~~Secretarial review~~ and the decision to begin the ~~public review process~~.

P.L. 99-659 amended section 304(a) of the Magnuson Fishery Conservation and Management Act in 1986. Congress wanted to speed the Secretarial review process by putting the Councils in charge of starting the 95-day "clock." They did this by adding paragraph (3) as follows:

(3)(A) The Secretary shall take action under this section on any fishery management plan or amendment which the Council characterizes as being a final plan or amendment.

(B) For purposes of this section, the term ~~Receipt date~~ means the 5th day on which a Council transmits to the Secretary a fishery management plan, or an amendment to a plan, that it characterizes as a final plan or amendment.

At the same time, Congress inserted a ~~new provision ((a)(1)(A))~~ to allow the Secretary to make a preliminary evaluation of the FMP or amendment and to immediately disapprove it:

(1) After the Secretary receives a fishery management plan, or amendment to a plan, which was prepared by a Council, the Secretary shall--

(A) immediately make a preliminary evaluation of the management plan or amendment for purposes of deciding if it is consistent with the national standards and sufficient in scope and substance to warrant review under this subsection and--

(i) if that decision is affirmative, implement subparagraphs (B), (C), and (D) with respect to the plan or amendment, or



- (ii) if that decision is negative--
(I) disapprove the plan or amendment, and
(II) notify the Council, in writing, of the disapproval and of those matters specified in subsection (b)(2)(A), (B), and (C) as they relate to the plan or amendment;

The House Report described the amendment as requiring "the Secretary to commence a review of FMPs or amendments to FMPs of the fifth day after the day on which a Council has transmitted to the Secretary a document that it characterizes as an FMP or an FMP amendment. The Secretary is required to immediately make a preliminary evaluation of the FMP or FMP amendment for the purpose of deciding whether or not it is consistent with the national standards and sufficient in scope and substance to warrant further review under this subsection." (H.R.99-165 at 23, June 10, 1985).

Thus the Council itself is to begin the Secretarial review by transmitting the FMP or amendment. The fifth day thereafter is the "receipt date" (Day 0), after which the 95-day schedule commences. The preliminary evaluation occurs within the first few days; the notice of availability of the FMP or amendment in the Federal Register is public evidence of an affirmative finding.

The problem with the 1986 amendment is that Councils were transmitting FMPs and amendments without the other documents needed to meet statutory deadlines. The Regional Director would declare a "receipt date" even though the proposed regulations were not in acceptable Federal Register format, or even though no Paperwork Reduction Act justification had been prepared. This meant proposed regulations could not be filed by Day 15, as required by section 304(a)(1)(D). Because we have insisted on honoring Congressional intent to retain the 45-day public comment period on proposed regulations, the time left at the end of this period but before Day 95--instead of the 35 days contemplated by section 304(a)--was reduced to a few weeks or even days. Once or twice we thought Day 95 might occur before the end of the comment period!

Some Regional Directors dealt with this problem informally by telling Councils they would not declare a "receipt date" until all the "pieces" were present and acceptable for processing. P/CM and GCF prepared an interpretive rule in 1990 to formalize this practice. In early 1991, at the Council Chairmen's meeting, there was consensus that no interpretive rule was needed, only written guidance, to insure that all necessary documents were available before Secretarial review began. So Bill Fox issued his memorandum to the Regional Directors in March of 1991.

The memo states the ~~RDs will decide whether the required~~ documents are present and meet at least the minimum requirements for making the necessary determinations." If satisfied with the

documents, the RD declares the ~~"receipt date"~~ and the derivative ~~"transmit date"~~. Then, as a separate step, he "will recommend to the Assistant Administrator, based on a preliminary evaluation of consistency with the national standards, whether to proceed with Secretarial review or to disapprove the FMP or amendment." F/CM conducts its own preliminary evaluation of the FMP as well.

Because the Fox memo treats both "starting the clock" and preliminary evaluation, some readers may have confused the two procedures. Steve Pennoyer, however, did send two separate memos, both dated November 13, 1991, on Amendments 18/23. One announced he would declare December 1 as the receipt date. The other recommended sending the amendments forward for public review.

It is true that the second memo does not recite that the amendments are "consistent with the national standards and sufficient in scope and substance to warrant review." Pennoyer expressed dissatisfaction with the SEIS and other supporting documents, but held out the possibility that deficiencies could be repaired during the public comment periods. He would not say the amendments were consistent with the national standards; but, because the analyses were lacking, he would not say they were inconsistent and had to be disapproved. By recommending publication of the proposed regulations, Pennoyer by implication made an affirmative decision based on his preliminary evaluation.

I do not think Pennoyer's decision was the only defensible one under the circumstances, but it can be defended. Given that the review is both immediate and preliminary, the decision to make an early disapproval really must be based on a finding that the amendments are inconsistent and insufficient, not on an inability to find that they are consistent and sufficient. There is some evidence in the record that the analyses could be repaired, which might allow findings of consistency to be made in the end.

cc: GCAK - Lisa Lindeman
F - William W. Fox, Jr.
F/AKR - Steven Pennoyer